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THE SCOTTISH JURY

LANDMARKS IN THE HISTORY OF JURY TRIAL

THE origin of the jury is one of the subjects on which an agreement has not been reached by writers on the history of law. A number of theories have been put forward at different times. At this day two of these theories receive considerable support. The first is that the jury system is a gradual and natural sequence from the modes of trial in use among the Anglo-Saxons and Anglo-Normans. The second—and perhaps the one more widely accepted at present—is that we owe trial by jury to the legal institutions of the Frankish empire. (Forsyth's "History of Trial by Jury," and Pollock and Maitland's "History of English Law"). Among other hypotheses is that of Meyer ("Origin and Progress of the Judicial Institutions of Europe") who attributes jury trial in part to the assize established by Henry II, and in part to the feudal courts instituted in Palestine by the Crusaders. Beyond question the assize of Henry II marks an important advance toward jury trial, but Meyer's hypothesis is not now supported. The feudal courts in Palestine were created about 1099, in the reign of Godfrey, Duke of Bouillon, and were *modeled* after those existing in the countries from which the Crusaders came. There were two secular courts, the one presided over by the Duke (then King of Palestine), in which twelve knights were the judges; the other, presided over by a feudal lord, in which the judges were twelve townsmen. There were also lesser courts on the same lines. They were, however, of the nature of permanent tribunals, and had resemblance in principle to the jury court. Another theory is that of Reeve in his "History of English Law." According to it the Northmen carried the Scandinavian mode of trial into Normandy and brought it with them to England. Turner, on the other hand, in his "History of the Anglo-Saxons," thinks that the jury system was in use during the Saxon period. But he cannot point to anything in the records that affords any substantial support to his theory. Other writers have attributed the origin to a national recognition of the principle that no man ought to be condemned except by the voice of his fellow-citizens. This principle, it is maintained, is found strongly asserted among all the Teutonic nations and the jury is simply a modification of their ancient assemblies. The objection to this theory is that the jury did not develop in traceable form in any other place than England.

The argument in favor of the opinion that the jury system is a

natural sequence from the modes of trial in existence among the Anglo-Saxons and Anglo-Normans is founded on the fact that there were certain elements in the Anglo-Saxon methods of administration from which jury trial might have been evolved. These were chiefly:—1. The Anglo-Saxon courts generally consisted of a president (the reeve) and twelve men, or a multiple of twelve. The voice of these twelve was the decision of the court, the president taking no part.¹ 2. The procedure in these courts. The assertion of a party was conclusive if supported by a certain number of witnesses called compurgators. In important cases this number was generally twelve. The compurgators were really witnesses to character. Originally the party, or the accused in a criminal case, could choose his own compurgators, but at a later period the accuser was allowed to name persons out of a proper class, from whom the accused was to choose his compurgators. Sometimes the reeve or head man of the district chose the class. Compurgation was not always competent, e. g., when a crime of open violence had been committed. Then the accuser and his compurgators having sworn, the accused had to meet his trial by ordeal. 3. In matters of general importance the testimony of the neighborhood was frequently appealed to. Thus the hundredors—those who attended the meetings of the hundreds—were competent witnesses of matters of common interest within the hundred. Such testimony is mentioned incidentally in the old chronicles. Thus, payments for land seem to have been made at the meetings of the hundred, so that if a dispute arose the inhabitants of the hundred might be competent witnesses. Charters and deeds were usually witnessed by a number of persons most interested in the grant, so that they might be produced as witnesses. The same practice was observed in the case of marriage. 4. Every care was taken that all dealings between man and man should be as open and public as possible. Secrecy was regarded as equivalent to fraud, and in some cases punished as guilt. If a man bought cattle without publishing the transaction

¹ The Anglo-Saxon system was, briefly, as follows: The smallest subdivision for the purpose of administering justice was the tithing. It consisted of ten families, the members of which were responsible for the good conduct of one another. The head man seems to have settled trifling disputes, but it is not certain whether there was anything of the nature of a court. The next subdivision was that called the hundred (or wapentake); which consisted of ten tithings, with a similar bond of mutual responsibility. The hundred court met once a month, and was both civil and criminal. Next was the court of the shire—the “scir-gemot”—which met twice a year. And, lastly, there was the court of the King, but it was not a fixed tribunal. Originally the whole of the free adult male population could attend the monthly and half-yearly meetings, but, as was the case on the continent, this seems in practice to have become limited to a smaller number, with the consequent formation of a class of judges. The Anglo-Saxon courts thus came to be usually composed of twelve men.

immediately, he must forfeit them. 5. The existence of sworn witnesses appointed in each district, whose duty it was to attest all private bargains and transactions, in order that they might give evidence in case of dispute.

These features of the Anglo-Saxon system, it is maintained, continued in force after the Norman Conquest. They all involve the idea that evidence of sworn witnesses is necessary for the settlement of disputed questions of fact; and in this idea is sought the foundation of trial by jury.

THE INQUEST, ASSIZE, AND JURATA

But the records of the Anglo-Norman period do not seem to support this theory. It is true that for more than one hundred years after the conquest no trace of trial by jury can be found. Much change might take place in that time, and if the history of the period were more obscure it might be difficult to question the theory. But there is evidence that at the very beginning of the Anglo-Norman period a method of ascertaining information existed in Britain on lines essentially different from anything that can be found in Anglo-Saxon times. The Domesday Book of William the Conqueror was compiled from information obtained by summoning the chief men from each district and making them state on oath the answers to the questions put to them. The early records also show that this plan was occasionally adopted for the purpose of ascertaining facts in important trials. These inquests, as they were called, were quite different in character from the Anglo-Saxon court or the Anglo-Saxon compurgators. The Anglo-Saxon court pronounced judgment, and the compurgators were summoned by one of the parties; they were merely witnesses to character, and all they did was to swear according to a formula ("that the oath is clear and unperjured which A hath taken.") But the men in these inquests simply stated facts in answer to questions. Their answers did not constitute a judgment. Further, they were summoned by a public officer, their answers were not of the nature of a formula, and they were not witnesses to character in the sense that the compurgators were. The practice of holding inquests was undoubtedly what paved the way for trial by jury. If jury trial originated in Anglo-Saxon institutions, it should be possible to show how these inquests, so different in character from anything else that existed in the country before, developed from these institutions. This it seems impossible to do. Such a change could only take place gradually, yet the inquests appear, without any previous traces, at exactly the same time that the Norman Con-

quest took place. On the other hand, a completely satisfactory explanation of the inquest is provided from another source. It was a prerogative assumed by the Frankish Kings of the Ninth century, probably in imitation of the Roman *Fiscus*, to ascertain and maintain their rights by means of an inquest, conducted in practically the same way as those under William the Conqueror were conducted. (Brunner's "Schwurgerichte," pp. 74-75; Pollock & Maitland's "History of English Law," Vol. I, p. 141). This inquest was not, properly speaking, an institution of the Frankish empire. It was rather a particular mode of procedure assumed by the Frankish Kings who in this way put themselves above the ordinary processes, which were much the same as those of the Anglo-Saxons. And it was used by them for a variety of purposes, including litigation, and was sometimes made the subject of a privilege granted to some favored body. When the Normans invaded that part of the Frankish empire known as Neustria they must have found this system of inquests in vogue. All traces of it in the other Frankish provinces disappeared with the breaking up of the empire and the spread of the Romano-canonical influence over that part of Europe. But, although there are no records of its use being continued in Normandy, the probability is that it was, and that the Norman conquerors brought it with them to England.

The inquests were not of very frequent occurrence in the Anglo-Norman period. Until the reign of Henry II (1154) they remained the King's prerogative. He could use this method of procedure when he chose, or he could order its use, or grant the right to use it as a privilege. Moreover, the details were far from regular. Sometimes the chief men summoned were all the important men of a county or district, and this was in accordance with theory; but on other occasions only a limited number were called, and procedure seems to have been very irregular in other respects. But in the reign of Henry II great advances were made. He introduced what is known as trial by assize, and if the term trial by jury be taken in its largest sense—i. e., trial in which the facts are ascertained by means of a body of neighbors summoned by a public officer to give upon oath a true answer to some question—this may be marked as the first recognition of trial by jury as part of the usual machinery of civil justice. The principle of the assize was the same as that of the inquests. What Henry really did was to confer upon the people the privilege which had formerly been reserved to the Crown. Where questions arose concerning (1) recovery of land of which a person had been dispossessed (disseised) or (2) rights of advowson, i. e., rights of patrons of churches, or (3) claims of vassalage affecting the civil status of the

defendant, the defendant might insist on trial by assize instead of bodily combat. If he decided to do so a writ was issued to the Sheriff commanding him to summon four knights of the neighborhood where the subject of dispute was situated, who were, after being sworn, to choose twelve lawful knights who knew about the facts. These twelve knights were to state to the court what they knew and the court decided accordingly.² It is interesting to note, with reference to the question of origin, that in the early practice it seems to have been the rule for the defendant who desired a case to be tried by assize, to pay a certain amount to the Crown for the privilege. Where other questions than those competent to assize were to be settled the old forms of trial had to be used. These were combat, ordeal, or compurgators. But the inquest, from being merely an occasional method, came into more frequent use, and, when the assize was established, naturally tended to imitate it as regards constitution and practice. Inquests came to be regularly composed of twelve men of the county, instead of the whole county (*comitatus*), and a court on the same lines as the assize was developed. These courts are frequently referred to by the old writers as *juratae*. The gradual displacement of the old forms of trial by the *jurata* marks the growth of trial by jury in its narrowed sense. In order that a question of fact might be settled in this way, it was at first necessary that both parties should consent, because the *jurata* was not an institution created by statute, nor was there any law or custom by which the parties might be compelled to resort to it. But the old forms were losing favor. The Church was strongly against both ordeal and combat, and as this feeling affected the judges they began to compel the parties to resort to the *jurata* by threatening resisters with the loss of their cases. So that what was originally an institution of an arbitral character, while it remained so in theory, became in fact a compulsory method of trial. At the same time its use became general, the assize being gradually displaced owing to its rigid form and limited application.

ORIGIN OF THE UNANIMOUS VERDICT

An important difference, however, between the jury of the twelfth century and that of the present day remained. Both in the assize and in the *jurata* the sworn men decided the facts from their own knowledge, not as judges of evidence. According to their oath the jurors were bound to decide from their own personal

² The court was presided over by the King's Justiciar. Justiciars had been appointed, now and then, at the pleasure of the King, ever since William the Conqueror; but Henry II established them on a systematic basis. The trial by assize was restricted to courts where the Justiciars presided.

knowledge, and some writers have held that they were simply witnesses; but that cannot be accepted. Although, according to the letter of their oath they may seem to have been first-hand witnesses, there is good reason to believe that they were not so in fact. Apparently it was the practice for each man who was to sit on the jurata or assize to make himself acquainted with the circumstances of the case in any way he could. He might know nothing about the matter before he received the summons to attend. His so-called "testimony" was often, therefore, nothing more nor less than a judgment, formed from what he had heard others say. According to Bracton, the writ which was issued by the Sheriff instructed the jurors to obtain information as to the facts of the case. Further, if the matter be considered from another point of view it is impossible to regard the jurymen of that period as first-hand witnesses or to think that they were looked upon in that light at the time. It was the theory of the inquest, and of the assize, and the jurata, that the case was decided according to the opinion of the entire county or district. The jurors were not merely twelve men; they were, in theory, the whole county, and their verdict was not the verdict of twelve men, but of the county. The fact that these jurors were not really witnesses, together with the arbitral nature of the jurata, goes a long way toward explaining the subsequent development of the jury. Had they been merely witnesses the tendency would have been toward separation. Each juror's testimony would ultimately have come to be taken separately, and the jury would have ceased to exist as a body, instead of becoming a body which judges the facts from evidence adduced before it publicly. According to the ideas of the times, unanimity was necessary to constitute the opinion of any body. The judgment of the county must be the judgment of every individual person in the county. The idea that the opinion of the majority constituted the opinion of the whole had not yet developed; that remained to be brought forth by the Scots. The verdict of the jury must therefore be unanimous. To have separately examined each juror would have made it impossible to find twelve men of exactly the same opinion, however many might be added (it was for some time the practice to add more jurors until twelve men were found who held the same opinion), while the separately obtained opinions of twelve men could never be put together and regarded as the verdict of the county. And the temptation to analyse the verdict was withdrawn owing to the supposed consent of each litigant; for each litigant has agreed to be bound by the verdict, and neither can quarrel with it.

How and when the practice of taking evidence in court developed,

it is almost impossible to say. Not even at the present day is anything said about witnesses in the record of a jury trial. Too much importance is put by many writers on the influence of statutory witnesses to deeds, who came to court to give their testimony when disputes arose. This practice may have had some influence—it brought out the distinction between *juratores* and *testes*—but probably very little, the procedure being comparatively rare. The practice, which, without doubt, existed in the thirteenth century, of jurors hearing beforehand what the parties had to say, and making inquiries for themselves, had probably the most important share in bringing about the change. There seems to be good reason to believe that something in the nature of adducing evidence was occasionally done in early times. We are told that, in compiling the first Year Book, documents were produced to inform the jury, and there are indications that juries listened to the evidence of persons brought into court by the litigants, though it is doubtful if these witnesses were sworn. Certainly there seems to have been no rule which would prevent such a procedure.

By the time of Henry VI (1422) the jury system is found in modern form. The only great change, in principle, which had still to evolve was that which took place when the jury ceased to use, or depend upon, private knowledge in deciding on the verdict. This change is closely connected with the abolition of attain and the introduction of new trial. In early practice, when a jury “went wrong” the jurors were punished by attain, but nothing was done for the unsuccessful litigant. He had to abide by the verdict of the county upon which he had put himself. That this should remain so, with the development of jury trial and the disuse of other modes of proof, was impossible. Justice called for a new trial, and expediency for the abolition of attain. With the disappearance of attain the reason for jurors using their own private knowledge ceased to exist, and the introduction of new trial on certain grounds (as, verdict contrary to evidence) made it desirable that they should not do so. At the same time the necessity that the jury should be summoned from the district ceased.

IN CRIMINAL CASES

Of jury trial in the prosecution of criminals there are no traces until long after the Conquest. Compurgation and ordeal were the only modes before the Conquest, and these, with judicial combat, remained the only methods until trial by jury in civil cases had obtained a firm hold. What has been called the “accusing jury” is the starting-point. The accusing jury had the same origin as the

jury in civil cases, viz:—the Frankish inquest. Much difficulty has been caused, as regards the question of the origin of jury trial by the fact that a law of Ethelred the Unready (997) instituted a moot, to be held in every wapentake, the twelve eldest thegno to go out with the reeve and to swear upon a relic which he put into their hands that they would accuse no innocent and conceal no guilty man. This looks very like the jury of accusation, and gave some support to the theory that the jury was of Anglo-Saxon origin. But no other trace of the existence of such a system in Anglo-Saxon times can be found, except in the church courts for the purpose of discovering sin; and the English Church was at that time coming under the influence of the Frankish. The conclusion arrived at, therefore, is that Ethelred's law was an offshoot of the Frankish system. Whether or not the procedure of accusing by twelve thegno was ever widely in force, every trace of it was gone at the time of the Norman Conquest. Then a criminal was brought to trial on the accusation of some particular person, or on account of the general rumor of his having committed the crime. This seems to have remained the practice until the reign of Henry II, when we find that King insisting that the ecclesiastical courts should adopt a method similar to the inquest. If an individual accuser did not come forward, then the rumor ("ill fame") must be sworn to by twelve lawful men of the neighborhood summoned for that purpose by the Sheriff ("Constitutions of Clarendon," 1164). Henry seems to have insisted upon this as an ancient rule, from which it is inferred that something of the sort had existed in Normandy, and probably been introduced into England, without, however, obtaining any hold. Such inquests were to be taken before the itinerant justices of the King or the Sheriffs (unless the cases came before ecclesiastical courts, which tried many offences, and the King appears to have been forcing these tribunals to adopt the same procedure that was used in secular courts). The twelve men who thus presented criminals for trial were at first practically both accusers and triers; for the effect of their accusation was the same as that of an unsuccessful attempt at compurgation—the accused had to face the ordeal. But, in theory, at least, the ordeal was the mode of trial, and it is hardly correct to say that these inquests (*juratae patriæ*) combined the grand and petty jury in one. The petty jury—the jury that tried the case—did not appear until ordeal was abolished. Then, however, the inquests began to combine both offices. There being no ordeal (it disappeared about 1215), the difficulty arose as to how the accused man was to be tried. Being accused, the criminal had

to choose a way of clearing himself. All that was left to him was proof by inquest. Hence on the disappearance of ordeal the inquest took its place. The accused put himself upon the judgment of his county. If he refused to do so the practice seems to have been to incarcerate him until he changed his mind. The result was that the jury which had accused the prisoner then proceeded to say whether he was guilty or not guilty. It did not follow that because a jury had brought a man to trial it would, when giving its own testimony, find him guilty. But such an idea grew—and was justified by some cases where jurors were fined for accusing and then refusing to convict—with the result that the principle came to be recognized that a man's accusers should not be put upon the inquest to try him. This stage, that of trial by a separate jury, had been reached by the time of Bracton and the principle was established by a statute enacted in 1350. The taking of evidence in court probably followed in the same way as in the case of the civil jury, though the exact course of this change is but dimly indicated. As in the civil juries, so in the criminal ones, the jurors were not always eye-witnesses, and, according to some writers, it was not an uncommon thing to allow persons to make statements in court. At all events, by the time of Edward III (1327-77) this advance had been made; in fact, jury trial in criminal cases had come to be almost exactly what it is today. The rule that the jury should come from the district was not abolished until the reign of George IV. New trial in criminal cases was not introduced. The only machinery to provide against the possibility of injustice is the prerogative of the Crown to pardon. If a judge doubt his own ruling as to the competency of evidence, sentence is not passed until the point has been considered by other judges. But this is purely a question for the judge's discretion.

VARIATION OF THE JURY IN SCOTLAND

The history of Scotland for the earlier part of the Anglo-Norman period in England is obscure, but there seems ample reason for believing that the influence of the Normans was almost as great on Scotland and Scottish law as it was on England and English law. In one way or another Norman adventurers obtained possession of most of the Lowlands and brought their methods of administration along with them. As a result the early Scottish kings are all seen endeavoring to set up courts like those in England. Procedure by inquest was promptly introduced. The old records show that jury trial in civil causes existed in Scotland as far back as the English jury can be traced. Cosmo-Innes's "Scottish Legal

Antiquities"). This evidence is found principally in the archives of outlying Sheriff courts where such ancient practices as these survived to a much later date than in other courts. An account of jury trial is given in the "*Regiam Majestatem*," a work which was long supposed to be a compilation of Scottish law made under David I of Scotland. This has, however, been discredited, the work being really only a copy of Glanvil's "*Treatise on the Laws of England*," published in the reign of Henry III. But other printed authority exists. In the "*Book of Decrets and Acts*" (1469) is an account of a trial concerning lands, in which twelve persons "decreed and delivered" according to their knowledge and understanding. Further evidence is found in a statute of 1585, which orders certain matters to be tried by jury.

From some cause which has never been clearly explained, the civil jury disappeared in Scotland in the seventeenth century, while it continued to develop in England. A complete method of administering justice in secular courts, such as Henry II founded, does not seem to have ever been established in Scotland. Such a system might have preserved the civil jury. Perhaps the most plausible explanation of its disappearance is that put forward by LORD KAIMES ("*Historical Tracts*."). He attributes it to the introduction of the Court of Session (1532) consisting of fifteen judges, who fulfilled all the requirements of a jury. It is doubtful, however, if this, or the influence of the Church, or any other reason offered by historians is sufficient. They do not explain how, though the civil jury died out, jury trial in criminal cases remained.

Erskine ("*Institute of the Law of Scotland*") tells us that jury trial of criminals has existed in Scotland from time immemorial. The method of presentment of crimes in early Scottish history was almost exactly similar, in principle at least, to that of England. In the time of Alexander II (1214) "taking up dittay," as the presentment of crimes was called, was done by the Sheriff and the Justice Clerk or his deputies. A "brieve" was issued to the Sheriff directing him to summon to a certain time and place so many of the best and most capable of each burgh, town, and barony, to give information of crimes in their respective bounds. The Justice Clerk made a digest of this return. It was called the Portuous Roll, i. e., a roll of offenders' names and a file of indictments. This continued, with modifications, to be the method down to the Union with England (1707). Whether Scotland owes her criminal jury to it or more directly to the adoption of the English form, is difficult to say. That this accusing jury did not develop into a grand jury in Scotland, as it did in England, was doubtless

largely due to the looseness of the ancient Scottish legal system. According to Hume's account of the history of the presentment ("Criminal Law") the process varied considerably at different times. No satisfactory form of procedure received permanence from statute. Many abuses crept in, and in the time of Queen Anne (1702) there was much complaint about the unnecessary expense. The method was then abolished, and a new system established by which the Sheriffs, magistrates, and other officers were to hold courts, there to receive information of criminal matters to be tried at circuit, written abstracts of which were to be transmitted to the Lord Justice Clerk or his deputies. The effect was that almost all the work fell to the Sheriff (county judge). In 1748 his office was remodeled, and now the duty falls upon him of making immediate inquiry into the circumstances of every crime committed within his jurisdiction.

There is one difference between English and Scottish juries in criminal cases for which no sufficient historical reason appears. The English jury consists of twelve men, the Scottish of fifteen. The number of the English jurors is explained by history. Twelve was the number of the assize of Henry II. Twelve also seems to have been a favorite Saxon number—e. g., the twelve compurgators and the courts consisting usually of twelve men. In Scotland also, twelve was the number usually summoned for "taking up dittay." Although the number varied in civil cases, it was generally twelve. But Erskine and Stair say that the practice of trying criminals by a jury of fifteen has existed since the remotest period of which there is any clear record. It may be partly accounted for by the fact that the Scottish criminal jury decides by majority (this has been the rule for four or five hundred years), whereas the English twelve must be unanimous. It is interesting to note, too, that in the civil process of "service of heirs" the jury consists of fifteen, and the number of judges in the Court of Session, when first instituted, was fifteen.

Trial of civil causes by jury was re-introduced, after long agitation and against considerable opposition, in 1815. At that period there were large arrears in appeals from the Court of Session to the House of Lords. Many issues which are now finally decided by jury were then taken on appeal to the highest court in the realm, and some of these cases, being purely questions of fact, were a cause of great difficulty in the House of Lords. As a result, LORD ELDON, in 1815, introduced a bill, which became a law, establishing a jury court separate from the other courts for the sole purpose of trying questions of fact remitted to it from the other courts.

This jury system was of the English type. In 1830 the separate jury court was abolished and jury trial was incorporated with the ordinary jurisdiction of the Court of Session. A statute of 1854, applicable to Scotland only, provided that if a jury in a civil case could not agree after deliberating for six hours a verdict returned by nine of the twelve would be accepted. But the civil jury continued to be looked upon as a more or less alien institution until 1868, when the Court of Session Act reconstructed court procedure and introduced, among other changes, the majority verdict.

SCOTTISH COURTS AND CIVIL JURY CASES

The judicial system of Scotland consists of the Court of Session, the High Court of Justiciary, the Sheriffs, Sheriff-Substitutes, Teind Court, Burgh Magistrates, Justices of the Peace, and two or three other tribunals with special and limited powers. The Court of Session, the supreme civil court, is composed of thirteen judges. It is divided into an Outer and Inner House. The Outer House consists of five judges of first instance, called Lords Ordinary, who sit separately, and whose decisions may be brought under the review of the Inner House by a "reclaiming note." The Lords Ordinary try matters of fact, either by proof, i. e., evidence taken before themselves without a jury, or by presiding over a trial by jury. The Inner House sits in two divisions, which are courts of co-ordinate authority, each consisting of four judges, with a quorum of three. They sit as courts of appeal from the decisions of the judges of the Outer House, and they also review the decisions of all inferior civil courts, unless such a review is expressly excluded by statute. An appeal lies to the House of Lords from the final judgment of either division. The divisions have a cumulative jurisdiction in practically all civil actions above the value of \$200. They exercise original jurisdiction in certain cases. There are sittings for trial by jury in the Inner House, when the presiding judge is one of the judges of the division. The High Court of Justiciary is the supreme court for criminal causes. It consists of thirteen members (the same judges who compose the Court of Session). It has jurisdiction over all crimes committed in Scotland. It has inherent jurisdiction to punish all acts which are plainly criminal although previously unknown and not within any statute. It is the only competent court in cases of treason, murder, rape, deforcement of messengers, breach of duty by magistrates, and in all cases in which by statute a higher punishment than imprisonment is directed to be inflicted. The Court of Justiciary holds courts in Edinburgh and circuit courts in certain cities and towns.

When sitting in Edinburgh it is styled the High Court of Justiciary. One judge can try a case, but in difficult and important cases two or more may sit. The civil jurisdiction of the Sheriff Court is very extensive, and need not be here defined, inasmuch as a Sheriff does not try such cases by jury. The criminal jurisdiction of Sheriffs is limited to offences in their counties, with certain exceptions. (Several Sheriffdoms may be combined under one Sheriff. There are fourteen Sheriffs in Scotland, and thirty-three counties). Sheriffs can try all crimes which involve only arbitrary punishment, and which are not restricted by statute to any other tribunal. The jurisdiction of Burgh Magistrates and Justices of the Peace, at common law, is now confined to petty offences, committed in their burghs or counties, and small-debt suits. The Teind Court, consisting of certain judges of the Court of Session, deals with the valuation of teinds, augmentation of stipends of Established Church ministers, and cognate matters.

In civil cases jury trials take place only in the Court of Session. The following is a list of causes that may be tried by jury:—All actions on account of injury to the person whether real or verbal, as assault and battery, libel or defamation; all actions on account of any moveables or relating to land, when in this latter the title is not in question; all actions for damages on account of breach of promise of marriage, or on account of seduction or adultery; all actions founded on delinquency or quasi-delinquency of any kind, where the claim is for damages only and expenses; all actions on the responsibility of shipmasters or owners, carriers by land or water, inn-keepers or stablers, for the safe custody of goods or commodities, horses, money, clothes, jewels, and other articles; and, in general, all actions grounded on the Praetorian edict *Nautae, caupones, stabularii* (fixing the responsibilities of shipmasters, inn-keepers and stablers); all actions brought for nuisance; all actions of reduction on the head of furiosity (madness) and idiocy, or on facility and lesion, or on force and fear; all actions on policies of insurance for maritime or fire or life insurance; all actions on charter parties and bills of lading; all actions for freight; all actions on contracts for the carriage of goods by land and water; and actions for the wages of masters and mariners of ships and vessels. But the judge before whom a case is called has a wide discretion in dealing with it. A statute allows proof on commission in place of jury trial in all cases above enumerated, except in actions for libel or for nuisance, or such as are properly and in substance actions for damages; but this method of proof is now out of practice. Another statute provides that the Lord Ordinary, with con-

sent of parties or on special cause shown, may dispense with a jury in any case pending before him. If the parties in any case consent to the Lord Ordinary trying such issue without a jury, he must do so, unless the Court, on the report of such Lord Ordinary, shall deem it inexpedient and improper. There is also a statutory provision that in any cause before him it is competent to a Lord Ordinary, without adjusting an issue or issues, to make an interlocutory order stating any question or questions to which the parties are to address their proof, and appointing such question or questions for trial by himself, without a jury. In regard to what cases are, in practice, sent to a jury, it can only be said that they are generally actions of damages, whether for accident, defamation or nuisance; actions as to public right-of-way, and actions of reduction of deeds on the ground of the incapacity of the maker, or of fraud. As a rule, the judge, on looking over the issue or issues, promptly advises counsel whether, in his opinion, a jury should or should not try the case. He has regard to (1) whether the action is of the class appropriate to jury trial, and if so, (2) whether there is any special cause for not so trying it. Few or many considerations may enter into the latter question, but it may be taken that he will not favor a jury trial if he does not deem it clearly necessary. It thus appears that practically the jury is merely an adjunct of the Court, an instrument of convenience, to be used or not used at the discretion of the judge before whom an action is brought. There are judges who do not conceal their lack of admiration for the civil jury system. LORD ARTWALL (of the Outer House) who, when at the bar, had the second largest practice as a jury lawyer, says in *Hart v. Fraser*, 1907, S. C.: "As to jury trials, I am not a great believer in that form of trial, and have no more than a becoming respect for that tribunal." Instead of a trial being held at the seat of the Court of Session (Edinburgh) it may be appointed to be tried at circuit, with or without a jury, but this rarely happens. Appeals from Sheriff Courts for a jury trial in the Court of Session are permitted by statute and are not uncommon, but are discouraged by the latter court on account of the expense involved and the inconvenience to witnesses. If an appeal of this kind be allowed, the Inner House may either remit to one of the Lords Ordinary or appoint one of its own members to preside at the trial.

HOW JURYMEN ARE SELECTED

There are common jurors and special jurors. Every man between the ages of 21 and 60 years is qualified as a common juror if, at the time of the trial in which he may be required to serve, he is seized

"in his own right, or in the right of his wife, of lands or tenements, of an estate of inheritance, or for his life or her life within the county or shire, city or place, whence the jury is to come, of the yearly value of five pounds (\$24.33) at the least, or shall be then worth in goods, chattels and personal estate the sum of two hundred pounds sterling (\$973.30) at least;" as a special juror if he pays taxes on one hundred pounds sterling (\$486.65) of valued rent in the county, shire or city where he lives, or pays taxes to the Crown on a house of thirty pounds sterling (\$146) yearly rental, or if he has lands and heritages in Scotland of one hundred pounds sterling (\$486.65) of rent per annum, or has personal property to the amount of one thousand pounds sterling (\$4,866.50). Certain persons are exempted from serving on juries:—All peers, judges of the Supreme Court, Sheriffs of counties, magistrates of royal burghs, ministers of the Established Church, and other ministers of religion who shall have duly taken and subscribed the oaths and declaration required by law, parochial schoolmasters, practising advocates and solicitors, court and certain other officials, professors of any university, physicians and surgeons actually practising, officers of the navy or army on full pay, lighthouse-keepers, and income-tax commissioners. The Sheriff of each county prepares a list of qualified jurors in the county, which is inserted in a General Jury Book, and he selects therefrom the names of persons qualified to be special jurors and enters them in a Special Jury Book. From these rolls all lists for trials by jury are made up, the names being taken in the order in which they appear in the rolls. The number of a jury in a civil cause is twelve—eight common and four special jurors. Not less than thirty-six nor more than fifty persons are cited. A list of these is returned by the Sheriff of the county, "but so that one-third of the number of jurors required cannot be divided equally into thirds, a number as near as may be, at the discretion of the Sheriff, shall be persons qualified as special jurors and distinguished in the return accordingly." Jurors are cited by the Sheriff Clerk of the county, who transmits a citation in a registered letter to each juror at his place of residence. He is entitled to "reasonable notice." The practice is to despatch the citation so that it will reach the juror not later than six days before the day on which he will be called upon to serve. If any of the persons fail to appear, they may be fined unless their excuses are accepted by the presiding judge. The remuneration to jurymen in civil cases is at the rate of ten shilling (\$2.42) a day (in criminal trials they receive nothing). The jurors are chosen in open court by ballot from the list of persons summoned. The name of each person is

written on a piece of paper; these papers are put in a box and lots drawn in the usual way. If any of the persons thus drawn do not appear, or are challenged with or without cause, another is drawn in his place. Each party has the right to challenge four jurors without cause; and on both sides these challenges are usually made by the counsel at the solicitation of other lawyers whose clients or friends have been drawn and wish to get off. In addition, any juror may be challenged as a party interested. Having thus described the formation of the ordinary jury, I may add that sometimes (though, it appears, rarely) one of the parties desires a special jury. He must then give notice of motion to the other side within four days after the latter has given or received notice of the trial; this notice must be lodged and served thirty-six hours before the motion is moved in court. The granting of a special jury is in the discretion of the court. If granted, the order is transmitted to the Sheriffs, Sheriff-Substitutes or Clerks in the district from which the special jury is to come, requiring them to return forthwith the names of thirty-six persons qualified to be special jurymen. The thirty-six names returned are reduced by the parties' solicitors to twenty, and precepts are issued to summon the jury.

SUMMARY OF THE USUAL CIVIL JURY TRIAL

After issues have been adjusted and approved, the Lord Ordinary, on motion of either party, appoints a time for the trial, or the case is taken to jury sittings in vacation at which Inner House judges preside. At any time before the jury is empaneled and sworn, it is competent to apply to put off the trial on account of the unavoidable absence or sickness of a material witness, or for other sufficient cause, to the satisfaction of the court, and upon payment of such expenses as shall have been incurred by the opposite party in consequence of the delay of the trial. As soon as the jury is empaneled the Clerk administers the following oath: "You swear by God, and as you shall answer to God at the great day of judgment that you will well and truly try (as the case may be) these issues, or this issue, and a true verdict give according to the evidence." (A juror who has conscientious objections to taking an oath may make a solemn affirmation). The Clerk reads the issues to the jury, after which the junior counsel for the pursuer (plaintiff) opens his case. The evidence for the pursuer is then offered. When pursuer's evidence is closed, the junior counsel for the defender opens his case; then follows the defender's evidence; when it is closed, senior counsel for the pursuer replies, and is followed by senior counsel for the defender. If the defender

adduces no evidence, however, pursuer's counsel has no right of reply. It is not within the scope of this paper to deal with the rules of evidence, method of examining witnesses, bills of exception, etc., which, broadly speaking, are much the same as in England and America. In regard to examinations, it may be said that a judge, in either a civil or criminal trial, will not permit counsel to browbeat or "badger" witnesses. He will exercise his authority in this respect to a considerable length for the protection of a witness who is obviously honest. But within certain limitations counsel are free to try to extract from witnesses, in a proper manner, anything and everything pertinent to the cause. After argument is concluded, the judge charges the jury on the whole case. As a rule, he gives a resume of the evidence on both sides, suggesting if he thinks proper, what he considers the reasonable view of the facts before the jury. But if the case has not been a long and complicated one, or if, for any other reason, he is of opinion that the jury require no guidance, the judge may make no reference to the facts, confining his charge to a clear statement of the law applicable to the case. The jury, if unanimous, may return a verdict immediately after the charge; if not unanimous, a verdict can not be returned within three hours, unless counsel on both sides agree to accept a majority verdict. After three hours a verdict by a majority may be returned. In case of equality the juror first sworn has a casting vote. A jury may be discharged without a verdict after six hours' deliberation; but this result of a trial is unknown in practice. Each of the issues is dealt with separately in the verdict. The Clerk of Court at once records the verdict, reads it to the jury, and asks if that is their finding. Special verdicts—wherein juries return certain findings of fact, leaving it to the court to apply the law—are common in England, but, although not unknown in practice in Scottish Courts, are now almost obsolete. To be final, a verdict must be applied by the Court, and this is done on motion of the party for whom the jury have found, at any time after the expiration of ten days after the trial. On such motion, it is competent for the Court to amend the verdict if it does not express accurately the intention of the jury; although it is not competent to show by the evidence of the jurymen, after the discharge of the jury, that the verdict does not correctly express their intention. The opinion of the Inner House upon any direction on a matter of law given to the jury at the trial may be obtained upon motion to enter the verdict for the party moving; and if the Inner House shall be of opinion that the direction was erroneous and that the party moving is entitled to the verdict in whole or in part, they

will direct the verdict to be entered for him, either absolutely or on such terms as they may think fit; or they may set aside the verdict and order a new trial.

The annual number of cases that come to trial is not far from 435. Of this number about 60 are tried by jury. Excluding actions relating to marriage, divorce, and separation, which are disposed of by a Lord Ordinary only and with no waste of time, somewhat more than one-fourth of the cases are tried by jury. Opponents of the civil jury—there are members of the bar who would dispense with it—have said to me that the average jury is too prone to find for the plaintiff, taking the view that anyone who goes to the trouble and expense of beginning an action probably has the right of it; that a judge, on the other hand, sees a case in a more impartial light, holding rather that anyone who comes into court with a claim must prove it fully; and that therefore the decisions of judges and juries are widely divergent, which reflects on the quality of the justice meted out by the latter. Unfortunately for this contention, the judicial statistics of Scotland do not sustain it; they show practically no difference in the proportion of cases decided in favor of plaintiffs by juries and judges, the plaintiffs being successful in a large majority of actions, however and wherever tried.

PROSECUTION FOR CRIME

When a person has been arrested for serious crime, an indictment—statutory in form and proceeding in the name of the Lord Advocate, who represents the Crown—is served upon him. The Clerk of Court prepares a list of jurors to be cited, which is open to the inspection of the accused or his solicitor and counsel. The minimum number of jurors cited for trials in the High Court or Sheriff Courts is thirty. As a rule, the High Court requires a list of forty-five, or of sixty-five if there be more than three cases, or more than three persons charged under one indictment. The number is at the discretion of the court. Jurors may be drawn from any part of Scotland for trials in the Court of Justiciary, (or in the Court of Session) but in practice they are drawn from the Sheriffdom (three counties, when the court sits in Edinburgh). Formerly jurors were cited personally by the macers of court or messengers-at-arms, but for a great many years they have been summoned, as in civil cases, by registered letter. The penalty for failure to attend, without an acceptable excuse therefor, is 100 merks Scots (\$27). The number of the jury is fifteen—ten common and five special jurors—who are drawn from the list of assize by ballot. If the accused be a landed proprietor he is entitled to

have a majority of landed men on the jury; an archaic discrimination, reminding us that the feudal system is not yet extinct in Great Britain. It was once customary to have a certain number of aliens on a jury for the trial of an alien, but that rule has been abolished. The prosecutor and the accused are each entitled to challenge five of the jurors peremptorily. The prosecutor, however, seldom exercises the right of peremptory challenge. Of course any juror may be objected to on cause shown. When empaneled the jury takes the following oath: "Do you fifteen swear by the Almighty God, as you shall answer to God at the great day of Judgment, that you will the truth say and no truth conceal so far as you shall pass in this assize." This peculiar form of oath was derived, it seems, from the "*Regiam Majestatem*" (about 1216) wherein this passage occurs (Lib. I. c. 12): "*Jurare autem quilibet illorum debet, quod ad hoc, ad quod vocati sunt, scienter veritatem non tacebunt, nec falsum dicent, quo tempore procedendum est ad assisam.*" For the most part it reads like an oath to be taken by witnesses rather than by jurors, which warrants the opinion that it was in substance the oath administered to the "accusing jury" in the time of Henry II (1154), made up of men who were actual witnesses or who obtained information of a crime by personal enquiry in the neighborhood and who were triers as well as accusers. That it has survived, in all the progressive changes in the law during more than seven centuries, is unaccountable.

The nature of the charge is fully explained to the jury, and the evidence follows. The oath to witnesses, administered by the presiding judge, is in the common-law form (and the same in criminal and civil trials). The witness, with right hand upraised, repeats it clause by clause after the judge. If from religious conviction a witness objects to swear in the common form, he must declare what form he considers binding on his conscience, and be sworn accordingly. Thus, a Jew takes the oath with covered head and with the Pentateuch between his hands. A Mohammedan swears on the Koran. A Chinaman before taking the oath breaks a saucer. If a witness, from conscientious motives, objects to the taking of an oath, he may make affirmation in statutory form. If at an early stage in the trial a juror becomes ill, it is the practice, with the consent of the accused, to draw another by lot, and to re-swear the whole, the witnesses making oath again to the notes of their testimony. When the evidence for the prosecution has been heard, and counsel for the accused has produced all his witnesses in defence, the proof is closed; the prosecutor is not allowed to offer evidence in replication. This defect in criminal procedure—it is generally

admitted to be a glaring defect—gives a decided advantage to a prisoner who has able and adroit counsel. A provision of the Procedure Act requiring that a list of witnesses and productions for the defence be given to the prosecutor at least three days before the trial, and that notice of any special defence, such as alibi or self-defence, be given at least two days in advance, goes far toward preventing surprise in ordinary cases; but, as the prosecutor's list of witnesses is closed, as a rule, before he receives notice of any special defence or a list of accused's witnesses, any line of defence which he cannot anticipate and expose by his own witnesses may go to the jury without a word in refutation, although it may be a pure invention. At the conclusion of the evidence, counsel address the jury, the prosecutor speaking first, and not having, as in England and the United States, any right of reply. This is another defect in Scottish criminal law, obviously favorable to the prisoner. To a certain extent, however, it is cured in practice by the disciplinary power of the presiding judge, which he does not hesitate to exercise if counsel undertake to play upon the jury. An outstanding, perhaps the most commendable, feature of a trial in a Scottish court is the care taken by the presiding judge to prevent counsel from misleading the jury. He will not tolerate "faking" or "gush" intended to obscure the facts. Counsel can not rise into the realm of sentimental oratory—without getting a fall. Addresses to the jury must be clearly pertinent. So long has this been an unwritten law of the courts that "faking" is now a thing unknown. There are artful counsel, as in other countries, but the art of persuasion practised by them, which comes from insight and consummate ability, is too subtle to be defined. In charging the jury the judge fully sets forth the law applicable to the case and may also sum up the evidence on both sides in a way that will leave little room for doubt in the minds of counsel and jury as to what in his opinion would be the proper verdict.

THE FINDINGS OF JURIES IN CRIMINAL CASES

The requirement in civil cases that the jury be enclosed for three hours before they are entitled to return a verdict by majority does not apply to criminal trials. They may return either a unanimous or a majority verdict without leaving the jury-box. But this privilege is never exercised. A former eminent member of the High Court of Justiciary has said that he found no tendency on the part of juries to unduly shorten their deliberations on account of the majority being able to return a verdict at once. All verdicts are

announced *viva voce* by the foreman, who must state whether the jury are unanimous or decide by a majority. The Clerk of Court enters the verdict in the records and reads it over to the jury. When the indictment contains only one charge, and the charge is proved to the satisfaction of the jury, a general verdict of "guilty" is returned; but in a case of murder it is competent to render a verdict of culpable homicide; also, a person indicted for robbery may be found guilty of theft, and one indicted for theft may be found guilty of breach of trust. Verdicts are sometimes returned which merely find facts, and such a finding will warrant sentence if guilt is necessarily inferred from the specific facts found and if these facts are consistent with the charge in the indictment. A verdict of acquittal is one of two—"not guilty" or "not proven." The latter form, known everywhere as "the Scotch verdict," originated about 200 years ago. The ancient Scots jury found the accused "fylit" (fouled) or "culpable" or "convict," or pronounced him "clean" or "free." Then "guilty" (from the Anglo-Saxon word *gyltig*, meaning "liable") and "not guilty" were substituted. Toward the end of the seventeenth century special verdicts came into use, the jury finding "the libel (charge) proven" or "not proven," whereupon the court declared the accused "guilty" or "not guilty." In 1728 a case arose in which the court was manifestly hostile to the prisoner and in fact instructed the jury to bring in a verdict of "proven." Counsel for the accused entered a vigorous protest against the special verdicts which had "crept in" and insisted that the proper practice was for the jury to say whether or not the prisoner at the bar was guilty. The jury in this case, not only being satisfied of the innocence of the accused but also strongly resenting the attitude of the court, returned a general verdict of "not guilty." From that date, it seems, the special verdict of "proven" was abandoned, juries resuming the exercise of their right to declare the prisoner guilty, or liable to the penalty; but "not proven" remained and was apparently regarded as precisely similar to "not guilty." In the course of time the Anglo-Saxon *gyltig* acquired a new signification, or at least a keener edge. Yet the eighteenth century writers found no fault with the alternative verdicts of acquittal. Later, however, "the Scotch verdict" was assailed, and for almost a hundred years many members of the bar and able men of other professions have leveled sharp criticism at "not proven." SIR WALTER SCOTT designated it as "bastard" and FORSYTH denounced it with much heat through several pages of his "History of Trial by Jury." A recent writer on the subject,

LORD MONCREIFF, a jurist of long experience and high authority, states cogently the principal objections to this verdict:

"In the main, 'not proven' is a verdict favorable to a criminal, and there are many cases in which, if the jury were driven to choose between the verdicts of 'guilty' and 'not guilty,' they would probably find the prisoner 'guilty.' In my personal experience—I mean, in cases in which I was engaged as counsel or judge—I do not remember a single case in which the prisoner, whom on the evidence I believed to be innocent, was accorded merely a grudging verdict of 'not proven'; while I remember many cases in which, through that verdict, those whom I thought guilty escaped. Generally speaking, the verdict 'not proven' simply means that the jury think that the prisoner is guilty, but that being of opinion, or holding in deference to the opinion of the presiding judge (though they are not bound to follow his view of the facts), that the evidence is not sufficient, they will not take the responsibility of convicting. But, why, in that case, do they not find the prisoner 'not guilty?' The verdict would seem to be used by juries in order to relieve their consciences and preserve their self-respect, or perhaps as a convenient basis for compromise. They will not find the prisoner guilty, and they will not find him not guilty; they acquit him, no doubt, but they place indelibly on record their view that in their opinion the innocence of the accused is extremely doubtful. Now, if a prisoner is innocent, this is an unfair verdict, but whether a prisoner is or is not innocent he should be given a verdict of 'not guilty' if the prosecutor has failed to prove his case."—*Blackwood's Magazine*, June, 1906).

On the other hand, the defenders of "not proven" point out that it gives a prisoner two chances of acquittal (as if this were desirable) and that a verdict of "not guilty" means more to a really innocent man than it otherwise would mean. Probably a consensus of the community at present disapproves this verdict; but it excites little controversy and is accepted as a fixture in the law, respectable for its antiquity at least. In practice "not proven" is returned in nearly three-fourths of all cases of acquittal, and undoubtedly in most instances the "panel" (person tried) who thus gets off has cause for gratitude to his remote progenitors for instituting the alternative verdicts.

In returning a verdict of guilty, the jury may recommend the prisoner to mercy. Sentence follows on motion of the prosecutor; the court has no power to pass sentence unless the prosecutor moves for it, and it is a matter wholly within his discretion to do it or not. Sentence in the High Court is final. No criminal case

can be taken to the House of Lords. The Crown may commute the sentence or grant a pardon.

It may be well to add that the great majority of offences wherein the maximum punishment provided by law does not exceed 60 days imprisonment are tried by Sheriff without a jury.

The number of prosecutions for murder in Scotland since 1890 has averaged about 10 a year. This number is but slightly less than the annual average for the previous thirty years. Since 1890 there have been 18 convictions of persons tried for murder and 7 executions. The ratio of executions to prosecutions and to convictions has changed little in half a century. For a long period the Crown has frequently exercised the prerogative of mercy. It would seem that Justice, even with the aid of the majority verdict, has not left an unduly sanguinary record. This becomes clear—strikingly clear—in view of the fact that there have been 221 executions in England since 1890. England has $7\frac{1}{2}$ times the population of Scotland. Taking population as the basis for comparison, executions in England and Scotland are as $4\frac{1}{4}$ to 1. When it is also considered that the Crown's prerogative of commuting sentences is exercised in a proportionately greater number of instances in England, nothing need be added to demonstrate that the Scottish criminal jury, with majority rule, leans to mercy's side. If further evidence were necessary, one might refer to the State of Illinois (having a population in 1900 of 4,821,550 to Scotland's 4,472,103) where executions average 5 a year to Scotland's 4 in ten years. In murder cases, not only Scottish jurors but also prosecutors and judges are decidedly reluctant to apply the death penalty. Probably under no circumstances would a person charged with murder be sentenced to death on a verdict of guilty returned by a bare majority of the jury. In ten years there have been three instances of a jury in a murder trial returning a verdict of guilty by a majority vote, when sentence and execution followed. In one of these trials (1897) the majority was narrow. Save in dealing with crimes of extraordinary atrocity juries are almost invariably disposed to take the middle course of reducing the indictment to culpable homicide, or recommending the prisoner to mercy, and in this they receive strong moral support from the prosecuting and judicial authorities, with some exceptions.

THE MAJORITY VERDICT

As we have seen in another part of this article, since 1868 Scotland has had no experience of what Hallam called "that preposterous relic of barbarism," the requirement of unanimity. Con-

temporary Scottish opinion in regard to it is not, therefore, derived from practice but almost wholly from observation and comparison. There can be no doubt about the preference of the bench and bar and intelligent masses. In a word, the majority verdict seems to be unanimously approved. Two of the reasons offered by members of the bar with whom I have talked on the subject are obvious: 1. In civil cases the cost to litigants who resort to jury trial is reduced to the minimum, as a new trial of the issues, on any ground, is extremely rare. 2. The cost to the public, in criminal cases, is also reduced to the minimum, as there is never a second trial.

From a higher point of view, that of justice, the arguments put forward in favor of the majority verdict are: 1. That in both civil and criminal cases the finding of a majority of jurors not hampered by the necessity for unanimity is more likely to be just than the verdict (if one is reached) of the whole, arrived at, it may be, by means of a compromise in which the majority yield to an ignorant or prejudiced minority, making the verdict in many instances really a minority verdict, which may represent the honest opinion of no member of the jury. 2. That it is illogical to require a unanimous finding by a jury upon the facts and their application to the case, while accepting a decision of a court given by a majority upon points of law, which may practically decide the case, for one party or the other, or which, in a criminal trial, may determine the fate of the accused. 3. That the quality of mercy, or the policy of leniency, if either ought to shape or color a verdict in a trial of serious crime, is found in a verdict of the majority; for the certainty of reaching a decision, probably without compromise, serves to impress every conscientious juror with a sense of grave responsibility. The judicial statistics bear out this assertion.

That the method gives general satisfaction to a people imbued with a love for justice, and jealous of their personal and property rights, is perhaps its best recommendation. Certainly they would not retain it for a day if they were not fully convinced that public and private interests are better guarded by the majority verdict in all jury cases than by the alternative of unanimity. This is all the more noteworthy because jury trials in civil cases are much restricted, as compared with England and America. It should be said that the civil jury, although a favored institution, has never become a fetic in Scotland. It is considered useful, for certain essential purposes; and public opinion holds that the majority verdict is essential to a sure, prompt and proper achievement of these purposes. It may be well to add that in civil actions a majority

verdict to which the defeated party usually bows, with resignation if not with satisfaction, is one returned by two-thirds of the jury or more. A majority of two, or one, will suffice, but such narrowly-decided cases always tend to strengthen the sentiment in favor of the German requirement of a two-thirds vote.

My own observation in America and Scotland of the practical working of the common-law and Scots-law jury systems has impressed me with the radical weaknesses of both, due chiefly to the inscrutable perversity of chance in the ballot for jurors and to laws which enable too many good men to evade service when drawn; but either judging from an ideal standard (now and then attained under each method) or accepting the character of the average jury as a necessary standard, I consider the majority verdict to be clearly preferable, in both civil and criminal trials. Not only are all the reasons and arguments offered in support of it, above cited, substantially valid, but I may say also that the majority verdict strongly recommends itself as a permanent means of barring out of court-rooms the "gilded hand" and other corrupting influences; for where one juror might be bought or otherwise improperly gained, the difficulties multiply when six or seven more, or even two or three, must be won over, and the impracticable is not attempted. Such, at least, has been the result observed in Scotland.

In conclusion, I may be permitted to re-state concisely the two principles in Scottish jurisprudence which seem to me to make for the most prompt and efficient and the least expensive administration of justice:

1. The majority verdict in all trials by jury.
2. The restriction of jury trial practically to the classes of cases, civil and criminal, in which public policy or considerations of propriety may require that a court should not pass upon questions of fact involved.

RUFUS FLEMING.

UNITED STATES CONSULATE, EDINBURGH.